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HARVARD

LAW REVIEW.

VOL. VIII. JANUARY 25, 1895. NO. 6.

LEASE OF RAILROAD BY MAJORITY OF STOCKHOLDERS WITH ASSENT OF LEGISLATURE.

[THE following notes were made with a view to preparing an opinion in Dow *v.* Northern R. R., *et als.*, decided some time since in the Supreme Court of New Hampshire, and not yet reported. Notes on another point investigated in this case were printed in 6 HARVARD LAW REVIEW, 161–183, 213–222.

The facts may be briefly stated as follows: The Northern Railroad was chartered in 1844. The corporation was authorized to construct, and keep in use, a railroad from Concord to Lebanon. Section 11 provides that "The Legislature may alter, amend or modify the provisions of this Act, or repeal the same, notice being given to the corporation, and an opportunity to be heard." Chapter 100, Sect. 17, Laws of 1883, enacts that "Any railroad corporation may lease its road, railroad property, and interests to any other railroad corporation," upon such terms, and for such time as may be approved by a two-thirds vote of the stockholders of each corporation. It was assumed that the Northern Railroad had notice of the proposed passage of this statute. On June 18, 1884, the stockholders of the Northern Railroad, by a vote of more than two-thirds, approved a lease to the Boston & Lowell R. R. On the same day, pursuant to this vote, the Northern Railroad, by its President, executed to the Boston & Lowell R. R. a lease, for ninety-nine years, of the railroad, rolling stock, etc., of the lessor; the lessee to pay a quarterly rental, and perform various other covenants. Dow and Robertson, stockholders in the Northern Railroad, voted against approving the lease; and seasonably filed a bill in equity, praying that the Boston & Lowell R. R. be enjoined from operating the road under the lease, and that the Northern Railroad and its directors be ordered to assume the management of the road.

A decree was made granting the prayer of the bill; three Judges concurring and one dissenting.

These notes are published at the request of the Professor having charge of the Department of Corporations at the Harvard Law School. —EDITORS.]

THE Northern Railroad is the name of "a collection of many individuals, united into one body," with certain rights and duties.[1] A private business corporation is "an association formed by the agreement of its shareholders," and its existence "as an entity, independently of its members, is a fiction." It is "essential to bear in mind distinctly that the rights and duties of an incorporated association are, in reality, the rights and duties of the persons who compose it, and not of an imaginary being."[2] "The statement that a corporation is an artificial person, or entity, apart from its members, is merely a description, in figurative language, of a corporation viewed as a collective body: a corporation is really an association of persons."[3] . . .

By the first section of the Northern Railroad charter[4] it is enacted "That Timothy Kenrick" and twenty other persons, "their associates, successors, and assigns, shall be and hereby are made a body politic and corporate by the name of the Northern Railroad." Here is no evidence of an attempt to introduce a mystery, or to create a fictitious being, to whom the State can give neither body nor mind. The stockholders are the corporation. They have the entire equitable title and beneficial interest of the property by them put in the corporate trust; and they are the corporate trustee in whom is vested the legal title. All of them, assembled at their annual meeting, choosing their seven directors by ballot, and exercising their stockholding rights in any other legal act, would be the visible body, and the acting mental and moral faculty, whose partnership name is the Northern Railroad. They are made a body, not by the Legislature, but by their own several acts of becoming stockholders and joint principals. Under the common law, without a charter, they can form a partnership body by becoming stockholders and joint principals in the business of a stage-coach common carrier between Concord and Lebanon. Under general law, without a special act of incorporation, if a majority of them are inhabitants of this State they can make themselves a railroad corporation.[5] "May associate them-

[1] Kyd, Corporations, 13.
[2] Morawetz, Corporations, *Preface.*
[3] Morawetz, § 227.
[4] Laws, 1844, ch. 190.
[5] Laws, 1883, ch. 100.

selves together, by written or printed articles of agreement, for the purpose of forming a railroad corporation," is the language of the Act. They are no more made a body by the law than they would be if they should form a corporation under the Act of 1883, or an unincorporated partnership under the common law. Whether they are incorporated or not, their company is formed by their contract with each other, and it has such powers and duties as the law allows them to give it, and such as the law grants and imposes. For whatever legal purposes their corporate body may be regarded as unreal, the fiction does not vest all the property in an imaginary being, and does not make the shareholders owners of an imaginary capital stock, for the purpose, or with the consequence, of giving to the majority of them, or to the State, a leasing power which the majority or the State would not have if the partnership were not incorporated.

As the plaintiffs could assent to the lease only in person, or by some agent or agents, and as they have not personally approved it but have seasonably opposed it, one question is whether, by becoming stockholders, they conferred a general leasing power over their shares upon a majority of the corporation. Whether the agents' power given by the plaintiffs to the majority is now regarded by either of those parties as too much or too little, it cannot be revoked or diminished by the minority, or increased by the majority. Neither party have any legal cause of complaint against their own agreement. If the plaintiffs are dissatisfied with the control they have given the majority as their agents, they can withdraw from it by the simple process of selling their shares; if the majority are embarrassed by the need of a larger agency, they can liberate themselves by the same process. The question, whether each of the plaintiffs, by the act of buying a share, gave the majority a general leasing power over that share, is not affected by the circumstance that such power, if given by him, could not be lawfully exercised until the State consented, as it did by the Act of 1883, to accept the lessees as substitutes for the lessors in the performance of the lessors' public duties. But the extent of the power vested in the majority may be obscured by overlooking the widely different origins of that power, and the distinction between the stockholders' private property which they did not receive from the State, and the public rights which they exercise as State agents. Eminent domain not being exercised over the plaintiffs' shares, it is necessary to observe the difference between

that private authority over each share of the private property which its owner alone can give the majority, and that public agency which the public alone can give them.

The lease of the Northern to the Lowell is an attempt to compel the plaintiffs, dissenting stockholders of the Northern, to exchange, for ninety-nine years, all their interest in the Northern for an annuity, secured by a right of entry, practically equivalent to a mortgage enforceable by strict foreclosure. The possibility of a non-payment of the annuity, and a resumption of the carrier business by the Northern, has no bearing on the question of the validity of the exchange of that business for the annuity. This question is to be decided on the possibility and the presumption that the Northern will have no occasion to resort to its security. The circumstance that the money to be received by the Northern is divided into many sums, due at different times, is immaterial. The law of the case is what it would be if the price paid for the estate of ninety-nine years had been paid in a single sum before the purchaser took possession of the road, and the security given were merely for the performance of covenants not relating to the payment of the price. The payment of the whole price in one sum, and the division of it among the Northern stockholders, would leave them members of their corporation and owners of an estate in remainder. Instead of being a step in a process of dissolving the Northern company, and winding up its affairs, the lease requires that company to "keep up and preserve its organization." Whether each stockholder's share of the price of the estate sold is paid to him in one sum at one time, or in many sums at many times, the sale of the road for ninety-nine years is not a provision for the Northern company's working the road, which, by the terms of the sale, is to be worked during that time, not by the Northern and the Lowell as joint principals, nor by the Lowell as agent of the Northern, but by the Lowell for the Lowell as sole principal.

"If the directors of the Concord Railroad should vote to build a line of telegraph on its road from Nashua to Concord, and stockholders should ask an injunction against the execution of the vote, one question would be, whether a telegraph line is reasonably necessary for working the road and carrying into effect the purposes of the charter. It would be largely, if not wholly, a question of fact."[1] But a vote of the directors and a majority of the stock-

[1] Burke *v.* Concord Railroad, 61 N. H. 160, 244.

holders to exchange all their corporate property for a telegraph line of equal value, and to change their business from that of a common carrier of persons and chattels to that of a telegraph company (the State waiving any objection it might make), would present no question of fact on which it could be held that a dissenting minority were bound. The telegraph business, taken in exchange for the railroad, could not be a mode or means of the Concord company's carrying on the railroad business, which, by the exchange, that company would abandon. On the question of incidental power, it would be immaterial whether the exchange were for ninety-nine years or for all time. In many cases the question whether a proposed change would be an exercise of an instrumental power, — a power of carrying into effect the purposes of the charter, and accomplishing the objects for which the corporation was formed, — is a question of fact. Can the Northern company buy one coal-mine or wood-lot for the purpose of obtaining fuel for their own use, and another for the purpose of carrying on the business of a coal or wood merchant? Can they build one shop for the purpose of making rails, bridges, and rolling-stock for their own use, and another for the purpose of making them for market? Can they erect a station twice as large as they now need, if its erection is economical and judicious in view of the future demands of their increasing traffic? When they have, judiciously or injudiciously, erected such a station, can they let half of it to a shoe manufacturer for three years, at the end of which time their railway business will probably require the whole; or must they suffer the loss of three years' income of half because a stockholder denies their power to make a lease? Many questions of combined law and fact cannot be answered with legal precision until their component parts are separated, and the facts are found. As a matter of fact, is the proposed corporate act a mode or means of the company's carrying on their business of transporting passengers and freight on their road between Concord and Lebanon? However difficult this question may sometimes be, some progress is made towards an intelligent decision when we cease to be confused by a blended mass of law and fact in a general question of corporate power, and begin to inquire what evidence there is on the question of fact. There is no evidence tending to show that, as a matter of fact, the lease of the Northern road is a mode or means of the Northern company's carrying on the business, which, by the lease, that company abandon for ninety-nine years; and the law of the case is not the opposite of the fact.

"The transaction in question was a purchase by the one company of the good-will and the whole concern of the other. That would, ordinarily speaking, be a transaction in which no company would be justified in engaging, because it certainly cannot be said to be within the ordinary scope of the object of any company to purchase the good-will of another." "The principles of law upon which the liability of joint stock companies is to be decided, as far as is necessary for the decision of this case, are very clear and perfectly well settled, though not always in practice steadily kept in view. The law in ordinary partnerships, so far as relates to the power of one partner to bind the others, is a branch of the law of principal and agent. Each member of a complete partnership is liable for himself, and, as agent for the rest, binds them upon all contracts made in the course of the ordinary scope of the partnership business. . . . It is obvious that the law as to ordinary partnerships would be inapplicable to a company consisting of a great number of individuals contributing small sums to the common stock, in which case, to allow each one to bind the other by any contract which he thought fit to enter into, even within the scope of the partnership business, would soon lead to the utter ruin of the contributories. . . . The Legislature, then, devised these companies, in a manner unknown to the common law, with special powers of management and liabilities, providing at the same time that all the world should have notice who were the persons authorized to bind all the shareholders, by requiring the copartnership deed to be registered, certified by the directors, and made accessible to all."[1]

In an ordinary partnership, each member is an agent as well as a principal; his liability for the partnership debts is unlimited, and he cannot expose his associates to a new risk by transferring his agency to an assignee of his share. In this State any number of persons, however large, may form such a partnership; and however obvious the hazard arising from the number and character of the members, in each of whom an agency is vested, the law of ordinary partnerships is applicable to the firm. They may diminish the risk by conferring the agency (not upon each member, but) only upon a concurring majority, or upon a board of directors chosen by major vote, or upon one manager chosen by themselves, or by directors. They may think this diminution of risk sufficient

[1] Ernest *v.* Nichols, 6 H. L. C. 401, 414, 417, 418, 419.

to allow a share to be sold and conveyed by a transfer of a certificate introducing a new partner. Even if a part or all of their property is real estate, a statute can authorize this mode of conveyance, and make the shares personal property for the purposes of sale, pledge, attachment, levy of execution, descent and bequest, without incorporation. In many cases of common-law unincorporated partnership, the contract has provided for an unlimited succession and duration by making the shares transferable: without a dissolution of the firm, and without a termination of its agency, membership passed, with the shares of a living member, to his vendee, and with the shares of a deceased member, to his legatee, executor, or administrator; and the general agency was vested (not in each member, but) in the majority of successive members, or a board of directors, or one manager, or in directors or a manager subject to such instructions as the majority of the successive members might see fit from time to time to give.[1]

Limited partnerships, formed for other purposes than banking or insurance, "may consist of one or more general partners, who shall be jointly and severally responsible, and of one or more persons, . . . who shall be called special partners, and shall not be personally liable for any debts of the partnership."[2] By similar legislation operating prospectively, the liability of all partners can be limited to their partnership property, without (as well as with) acts of incorporation. The Northern Railroad charter provides that "This corporation shall hold and enjoy the privileges and franchises herein granted, subject to the laws in relation to corporations and railroads as they now stand in the Revised Statutes of this State."[3] The stockholders of an incorporated "company having for its object a dividend of profits . . . shall be personally holden to pay the debts . . . of such company, . . . in the same manner and to the same extent as though the stock were owned and the business transacted by the stockholders as unincorporated copartners."[4] "There is no limitation . . . to the general liability of the stockholders to pay all the debts of the corporation, as set forth in the first section, if the proper steps are taken to charge them."[5] In a limited partnership not incorporated, a spe-

[1] Tappan *v.* Bailey, 4 Met. 529, 530, 536; Tyrrell *v.* Washburn, 6 Allen, 466, 467, 468, 472, 474, 475, 476; Skinner *v.* Dayton, 19 Johns. 513, 539, 540, 557, 560, 563, 570. In a partnership contract, the members have called themselves stockholders. Farnum *v.* Patch, 60 N. H. 294, 295.

[2] Gen. Laws, ch. 118, §§ 1, 2.

[3] Laws, 1844, ch. 190, § 10.

[4] Rev. St., ch. 146, § 1.

[5] Chesley *v.* Pierce, 32 N. H. 388, 400.

cial partner is not personally liable for any debts of the firm. By the Revised Statutes and the charter of the Northern Railroad, each member of that incorporated partnership was personally liable for all the debts of the firm. Under the subsequent modification of the personal liability law,[1] that company did not cease to be an incorporated partnership. Before the liability of the stockholders was limited, they were joint principals in the business of a common carrier on their road between Concord and Lebanon, sharing the profits and losses of that business; and such principals are partners.[2] Since their liability was limited, they have been joint principals in the same business, sharing all the profits and all the losses that have happened. They have shared all the profits and all the losses because they have been partners. They are partners, not because they share profit and loss, but because the business is theirs, and is carried on for them by their agents.[3] Their partnership relation was not extinguished by the statutory limitation of the amount of loss they are liable to share. Whether incorporated or not, a partnership may be limited in respect to liability as well as agency.

The Northern Railroad, though not originally limited as to personal liability, was limited as to the number of partners authorized to act as agents of the firm. The management was vested in seven directors chosen annually. The business of the firm was their transportation of passengers and freight on their road between Concord and Lebanon; and the directors were made the agents of the firm for the transaction of that business.[4] The majority of the firm having sold an estate of ninety-nine years in the property of which they and the objecting minority hold the equitable title, it is for the majority to justify the sale by showing their power to act for the minority. Of power passing directly from the minority to the majority, the defendants offer no oral evidence, and no written evidence but the charter. The partnership contract, written in the charter, makes no express mention of the majority; but when it provides that seven directors shall be chosen by ballot at the annual meeting of the stockholders, the meaning is that the choice shall be made by major vote.

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[1] Gen. Laws, ch. 149, 150; C. Bank *v.* Fiske, 60 N. H. 363.

[2] Farnum *v.* Patch, 60 N. H. 294, 326; Burke *v.* Concord Railroad, 61 N. H. 160, 243.

[3] Eastman *v.* Clark, 53 N. H. 276; Parchen *v.* Anderson, 5 Montana, 438.

[4] Laws, 1844, ch. 190, §§ 2, 3, 4, 5, 8.

The directors "are authorized and empowered, by themselves or their agents, to exercise all the powers herein granted to the corporation, for the purpose of constructing and completing said railroad, and for the transportation of persons, goods, and merchandise thereon, and all such other powers and authority for the management of the affairs of the corporation, not heretofore granted, as may be necessary and proper to carry into effect the object of this grant." [1] The lease is no stronger than it would be if the power thus expressly given to the directors were expressly given to the majority of the stockholders. The power given by the contract to the directors is the authority of an agent to act for his principals within the scope of his employment; and this authority is the same whether expressly or impliedly given to a majority of the principals, or to seven or one of them. Its character and extent, and not the number of persons who can exercise it, is the material subject of inquiry. Whether the joint principals are called partners or not, the question of the validity of the lease is a question of agency. In the nature of things it is impossible for the majority of the stockholders to have any other authority to bind the minority by a contract than that of agents. The act of appointing the majority as agents of the minority is the act of the minority, and not the act of the State. It is not legislation. If it were, no appointment of any agent to do any business for any principal could be made by anybody but the State Legislature, or some other law-making assembly. If the stockholders are regarded as a single corporate body, the result is the same. The majority are not that body, but merely a part of it, and agents of the whole so far only as the whole has given them authority.

As agents, the majority can do whatever is necessary to carry on, for their principal, the principal's business of a common carrier between Concord and Lebanon. Within limits, they can select the mode and means of executing their agency. The lease, instead of being a mode or means of their carrying on that business for their principal, transfers it to another principal for ninety-nine years, and transfers their principal to the vocation of a landlord and rent-receiver, which is not, in kind or degree, the same business as carrying passengers and freight. The legal scope of their employment is within the bounds of their principal's business, or, at most, those bounds and a proceeding for winding up

[1] Union M. F. Ins. Co. *v.* Keyser, 32 N. H. 313, 315; Bissell *v.* M. R. Co., 22 N. Y. 258, 267.

that business, and dissolving their principal. If this limit of their agency were not the measure of their power, every one who becomes a member of a partnership, incorporated or unincorporated, in a business specifically defined and limited by the partnership contract, would thereby authorize a majority of the company (with a legislative waiver of public objection) to carry off his investment into all other business within the range of human capacity; and every one who employs an agent in any business for any purpose, however restricted by the contract of employment, would thereby empower him to bind the principal by any contract the principal could make in any other business for any other purpose.

When A employs B and C as his general agents in the cultivation and management of his farm (No. 1), he gives them an implied power to do what is necessary for exercising the authority expressly granted. They cannot sell the farm.[1] Their sale of it, compelling their principal to abandon the work he employs them to do, would not be a performance of that work. Evidence that his agriculture is unprofitable, or that, for any reason, a change of the investment would be judicious, would not prove their power of sale. His discontinuance of his farming business is a question he does not submit to them for decision. They cannot sell and convey the farm for ninety-nine years, or for the shorter term of his natural life. Their general authority to carry it on for him, as his agents, is neither a power of excluding him, his heirs and assigns, forever from the business of a principal in carrying it on, nor a power of ousting three generations of owners. By making a lease, his agents would attempt to change his vocation from that of a farmer to that of a landlord. Employed by him in the cultivation of the soil, they would assume to embark him in a different business. A lease for ninety-nine years might be more embarrassing and disabling than a sale. With the cash proceeds of a sale, he could buy another farm which he might not be able to obtain in exchange for a right to collect rent. By a lease, his privilege of changing his investment might be seriously impaired. For many practical purposes, an unauthorized sale of his land for its value in money might be a less violation of his rights than an unauthorized lease for ninety-nine years. But the possible consequences need not be considered. The primary legal objection is sufficient. The express authority of B and C to carry on his farm for him does not

[1] Story, Agency, § 71.

include an implied authority to deprive him of its control, possession and use. His appointment of them as his managing agents does not alienate his right to be the principal in the management, and does not confer the power of alienation on them, or on any branch of the government.

A sale or lease of the farm by B and C may not terminate its cultivation. They may become the agents of D, the purchaser or lessee, and carry it on for him. The same crops may be raised, the same stock kept, the same tools used, and the same work done. There may be no change in the character or extent of the business, and no other innovation than the substitution of D for A as the principal. But the validity of this exchange depends upon its being held that A's involuntary abandonment of his business is not, for him, a fundamental change of business, and that B and C can sell or let his farm, because a sale or lease will work no essential alteration in his legal and actual position as the principal in carrying it on. In an action brought by A against D to recover possession, the question of the agents' authority would be presented by a plea that the cultivation, continued by D, left A's calling substantially unchanged, and that A's agents carried on his farming business for him by transferring it from him to another principal. If the transfer were by a lease for ninety-nine years, the plea could also set forth the fact that a remainder is left in A which he can dispose of by a deed or will giving the grantee or devisee (his heirs and assigns) a right of possession and use at a remote period in the future. But A's dominion over his land, to-day, and during the remainder of his life, is a material part of his title. When the occupation is transferred to D by a valid lease, the lessee takes the land for the stipulated term, and for a use that is either public or private. The Legislature cannot authorize him to take it for a private use without A's consent. Against A's objection, D cannot be authorized to take it for a public use without a judicial ascertainment[1] and a prepayment of a sum of money equal to the value of what he takes. A conveyance of the land to him by B and C for a term of years at an annual, semi-annual, or quarterly rent, is not a provision for the prepayment of the judicially ascertained value of the whole term. On the question of the validity of the conveyance, it is not material whether the number of generations of evicted proprietors is three, or thirty, or one.

[1] Cooley, Const. Lim. 563.

The complaint that D has taken the land is not answered by the plea that he intends to keep it only ninety-nine years. This plea would disclaim any temporary or provisional arrangement rendered inevitable or reasonably necessary by circumstances. And if the question were, not whether D has taken the land, but whether he intends to keep it an unconstitutional length of time, it would be as difficult to hold that A would not be deprived of his property by taking it from him for a term of ninety-nine years, as to hold that he would not be deprived of his liberty by imprisonment for the same term. So far as the legality of his deprivation is concerned, he might as well be ousted by a perpetual lease as by one which leaves him a remainder so distant that, in the ordinary course of nature, for the usual purposes of ownership, the farm that was his will never be his again.

When A, B and C are partners in the business of buying and carrying on another farm (No. 2), they are joint principals, and by fair implication, in the absence of express stipulation, each makes the others his agents for doing the joint business in the usual way, within the limits prescribed by the character of their enterprise. If B and C can bind A by an exchange of hay for a mowing-machine, and cannot bind him by an exchange of the farm for a saw-mill, it is because in the former case, by the exchange, the partnership business is carried on by B and C acting as principals for themselves and as agents for A, and in the latter case (aside from the law of real estate conveyance), the partnership business is not carried on, and therefore B and C are not exercising the power of agency given them by A. In their dual capacity, as principals, and as agents of A, they can do for the firm whatever is customary and necessary for the execution of the partnership contract, and the accomplishment of its object.[1] If buying farms and selling them, or letting them for ninety-nine years, had been the business of the firm and the object of their contract, the power of agency would have been very different from that given by the formation of a partnership for the ownership, cultivation and use of Farm No. 2.[2] As the general agency of B and C in carrying on Farm No. 1 for A as sole principal is not executed by their conveyance of the whole title, or a term of ninety-nine years, or a life estate, transferring A's business from him to another principal,

[1] Story, Partnership, §§ 101, 102, 111–114; 1 Lindley, Partnership, 236; Kimbro *v.* Bullitt, 22 How. 256, 264–268.

[2] Anderson *v.* Tompkins, 1 Brock. 456, 460; Chester *v.* Dickerson, 54 N. Y. 1.

so their agency for A as one of the principals carrying on No. 2 is not executed by their making a similar conveyance that substitutes D for A as a principal in carrying on that farm. In each case, the expulsion of A from the position of principal by his agents would be the opposite of what he authorized them to do.

The law does not require B and C to remain in the firm beyond the time stipulated in their agreement. Any member of an ordinary partnership, the duration of which is indefinite, may dissolve it at any moment he pleases, and it will then be deemed to continue only so far as may be necessary for the purpose of winding up its affairs. Even if its duration is defined, circumstances may arise giving a partner a right to have it dissolved before the expiration of the time for which it was originally agreed to last. A cause of its dissolution may be furnished by the misconduct or insanity of one of its members, the hopeless state of its business, or any circumstance by which its continuance, or the attainment of its object, is rendered practically impossible.[1] For the purpose of paying debts, or avoiding bankruptcy, it may become necessary that the partnership business of A, B and C should be terminated, and their farm sold by them or a receiver; but a sale of it to D, or a lease of it to him for ninety-nine years, cannot be necessary for the purpose of enabling the firm to carry it on as owners and principals under their partnership agreement. They may not be able to go on under that agreement without mortgaging the farm: the mortgage may be foreclosed; and a mortgage made indefeasible by strict foreclosure is an absolute deed. But the possible necessity of a mortgage for prolonging their business[2] does not show that their power of carrying it on is exercised by an unnecessary deed or lease that instantly brings it to an end.

Their performance of their general contract for cultivation and management involves a frequent choice of methods. A great number of details, large and small, constantly await their determination. It is improbable that the partners will agree on all of them; and a requirement of unanimity might obstruct their operations, and even defeat the object for which the partnership was formed. There is, therefore, a reasonable inference of their intention that a minority, by mere dissent without dissolution, shall not control, impede or prevent the performance of their contract,

[1] 1 Lindley, Partnership, 220, 222; 3 Kent, Com. 53–62; Skinner *v.* Dayton, 19 Johns. 513, 538.

[2] Pierce *v.* Emery, 32 N. H. 484, 504.

and that it may be performed according to the will of the majority. The power of a majority, whether expressed or inferred, is the power of an agent to act for his principal, and of a principal to act for himself. A, B and C are the firm, and agents of the firm. This is one form of the proposition that they are principals, and agents of each other. What shall they plant? What produce shall they sell? When shall they sell or buy anything, and at what price? What blacksmith shall they employ? Of what material shall they build a fence? If, between A and his copartners, he is bound by their decision of such questions, notwithstanding his dissent, it is because the questions decided are within the partnership jurisdiction, and his agreement that the farm shall be carried on by the firm for the firm makes his partners his agents, and authorizes a majority to control in the cultivation and management required by their contract. The implied agency of a majority to carry on that business for A, B and C as principals, like the implied agency of one of them, is not exercised by a transfer of the whole business to D as lessee and sole principal for ninety-nine years.

The partners engaging in the business of carrying on Farm No. 2 can rescind or modify their contract. They can abandon that business, lease the farm to D for ninety-nine years, and become mere landlords, receiving rent from the tenant who takes the place of principal in the business from which they withdraw. But the partnership agreement, made by three, cannot be altered by one or two. It is an agreement made by each one, on one side, with the other two, on the other side. Each is bound by his own contracting power, exercised by himself originally, or by himself or his agents afterwards. The agency of B and C to act for A in the execution of the partnership contract is not a power to alter A's agreement, or to make an alteration in the partnership business that would be a violation of the contract. The business need not always be continued precisely as it is begun. Improvements required for its successful prosecution are ways and means supposed to be contemplated. But the contract to be performed until it is annulled or changed, is an agreement that the farm shall be carried on, not by anybody for anybody, but by the firm, and for the firm, as principals. So long as that is the contract, the question of law raised by a lease to D for ninety-nine years against A's protest, is, not whether the transfer of the whole business from the firm to a different principal is judicious, nor whether a majority's

violation of a minority's right is a custom and a public policy, but whether the transfer is a performance of the contract, or a violation of it. While all can unmake or alter the agreement which all make to carry on the business as principals, all cannot perform it by putting D as principal in their stead for ninety-nine years; and a change that is not performance when made by all, is not performance when made by a majority.

If the partners accept an act of incorporation containing the substance of their partnership articles, and convey their partnership property, from themselves unincorporated, to themselves incorporated, the authority of B and C over A's share of the farm is not increased, and their case is not altered in any particular that affects the validity of a lease for ninety-nine years made by a majority against the objection of a minority. As owners of farm-shares, B and C have a right of sale as a part of a process of corporate dissolution (whether with or without judicial proceedings we need not now inquire). This right of sale is not given them by their agency in carrying on A's farm (No. 1). Their corporate power to bind A by a lease of Farm No. 2 for ninety-nine years, like their authority to bind him by a lease of No. 1, is a question of agency.

In 1804, thirty-one persons, including the two plaintiffs, became partners in the publication of the "British Press" and "Globe" newspapers, and agreed that the business should be managed by a committee, chosen quarterly, and that the resolutions of the majority of the partners present at all general meetings should be binding on all. In 1807, the partnership "having been for some time a losing concern," the whole property was sold in pursuance of a resolution passed at a general meeting. The plaintiffs dissented. All, "except the plaintiffs, acceded to the sale, and received their shares of the purchase-money." It was held that the majority could not sell the whole property; and the decree of the Master of the Rolls against the purchasers for an account of the profits made and the losses incurred after the sale, was affirmed, on appeal, by Eldon.[1] The agreement that a committee should manage the business was held, not to mean that the committee could transfer it to another principal by a sale. The agreement that the resolutions of the majority should be binding on all was held

[1] Chapple *v.* Cadell, Jacob, 537. Compare the opinion of the same Judge in the leading case of Natusch *v.* Irving, Gow on Partnership, App. 398, ed. 3. See also Const. *v.* Harris, Turn. & R. 496; 2 Lindley, Partnership, 600–604.

to mean resolutions as to the transaction, and not a transfer, of the business. If the agreement had been to engage in the purchase and sale of newspaper establishments, the sale of the "Press" and "Globe" by the majority would have been valid without the express stipulation as to the power of the majority. The sale that would have been an act in execution of a contract to carry on the business of buying and selling newspaper establishments, was held not to be performance of the contract to carry on the business of publishing the "Press" and "Globe." When the firm had published those papers for some time at a loss, and nearly all voted for a sale, it is not improbable that the condition of the business was such that, on a bill in equity, the law would have dissolved the firm, and would have wound up its affairs by selling its property, paying its debts, and dividing the residue of assets among the partners; and if the work of winding up would be as well and as safely done by the majority as by the law, there may be a question whether equity would interpose an injunction. But if the contract to carry on the partnership business of publishing the "Press" and "Globe" included an implied stipulation that the firm might be wound up by a majority, there was no inference of an agreement that a majority might make a lease of all the partnership property for ninety-nine years. By such a lease, the firm would neither carry on its business nor wind itself up. It is said that if partners intend the majority shall have power to wind up or sell the whole concern, the authority must be expressly given; for it cannot be inferred from the general language of a provision authorizing the majority to direct and regulate the concerns of the partnership.[1] "Although general powers of management necessarily include power to sell in the ordinary course of business, such powers do not authorize sales of an unusual description, *e. g.*, a sale of the business of the company."[2] If a sale of the whole business, by a majority, for the purpose of winding up, is an exception to this rule, the exception does not include a lease by which the firm is neither wound up, nor allowed, for ninety-nine years, to do the work it agreed to do.[3]

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[1] Story, Partnership, § 213; Collyer, Partnership, § 223.

[2] 1 Lindley, Partnership, 295.

[3] See also Colman *v.* E. C. R. Co., 10 Beav. 1, 14, 15; Simpson *v.* Westminster Palace Hotel Co., 8 H. L. Ca. 712, 717, 718, 719; Featherstonhaugh *v.* Lee Moor, P. C. Co., L. R. 1 Eq. Cases, 318; Ashbury, &c. Co. *v.* Riche, L. R. 7 H. L. 653, 664, 665, 667, 668, 669, 671, 684, 687, 693; Thomas *v.* R. R. Co., 101 U. S. 71, 81; Hutton *v.* S. C.

By a contract signed by about fifty persons, in 1839, the subscribers agreed to become partners in a firm to be styled the "Farmers' and Mechanics' Store," and to pay the sums annexed to their respective names, as the capital to be used by the firm in carrying on a retail trade in domestic and foreign goods at Bath. The twelfth article of the contract provided that there should be "neither purchase nor sale of ardent spirits by the concern." The business forbidden by this article was allowed by an amendment to which two of the subscribers (the plaintiffs in the reported case) did not assent; and it was held that they were not bound by the altered articles of partnership.[1] The plaintiffs did not pay the sums set against their names, and were discharged from liability by their rescission of the contract which the other parties had violated. If the violation had occurred after the plaintiffs contributed their shares of the capital, when mere rescission would not be a sufficient relief, they would have been entitled to an injunction against the purchase of spirituous liquor, or a dissolution of the firm and a division of its property, or some other complete redress. They could not be compelled either to be partners in the business prohibited by their contract or to sell their shares, but would have an adequate remedy in an appropriate suit. If the majority were dissatisfied with the twelfth article, they could sell their shares; but they could not put the plaintiffs to the alternative of submitting to the wrongful change of business, or withdrawing from the firm. Violations of the contract by the majority, before and after the plaintiffs paid their shares, would present different questions of procedure. But a material and unauthorized change of the business after they invested their money in it, would be no less a violation of their legal right than a prior change; and their legal remedy would be no less effectual in one case than in the other.

The decision that the change of business was material and substantial, and that no dissenting partner was bound by the alteration of the twelfth article, was an ascertainment and adjudication of the original intention of the parties. If the twelfth article had required ardent spirits to be kept for sale under the license law then in force,[2]

Hotel Co, 2 Drewry & Smale, 521, 524, 525, affirmed on appeal, 11 Jurist (N. S.) 551; Pickering *v.* Stephenson, L. R. 14 Eq. 322, 340; Ward *v.* G. J. Water Works, 2 R. & M. 470; Davis *v.* Old Colony R. R. Co., 131 Mass. 258, 259; Day *v.* S. S. B. Co., 57 Mich. 146, 150; Lucas *v.* W. L. T. Co., 70 Iowa, 541, 545, 546, 549, 550.

[1] Abbott *v.* Johnson, 32 N. H. 9, 19, 20.

[2] Pierce *v.* State, 13 N. H. 536, 538.

the contract would have been materially altered by a prohibitory amendment made by a majority of the firm; and a partner not assenting to such an amendment would not be bound by it. It might cut off the only branch of their trade in which he took any interest. His object might be a share of profit; and he might be of opinion that, at that time and place, without ardent spirits, there would be no profit. If the change were made before he paid his share of the capital, he could rescind his contract: if it were made after payment, he would have ample remedy by process of law adapted to the situation. Such an alteration of the twelfth article, or any other part of the agreement, as would not change its meaning, or affect any right or obligation of any contracting party, would be immaterial.[1] Authorizing a large majority or a small minority to conform the business to a material alteration made by them in the contract, is not legislation; and on the question of the validity of the alteration, it is not material whether the partnership is incorporated or not; in either case the contract of fifty partners binds forty-nine of them as firmly as it binds one; and the contract of the fifty, that could be made only by the non-legislative power of all the contracting parties, can be materially altered only by the non-legislative power of all who are parties at the time of alteration. "The majority of the Farmers' and Mechanics' Store may alter the twelfth article of the partnership contract by accepting and exercising the power hereby given to that unincorporated company to sell ardent spirits; and the majority of the Northern Railroad may alter the partnership contract by accepting and exercising the power hereby given to that incorporated company to lease their road for ninety-nine years." A statute in that form would not decide the judicial question of the materiality of the alteration of contract and business, but would present the question whether the twelfth article is performed by selling ardent spirits, and whether the partnership agreement of all the Northern company to carry on the business of transporting passengers and freight on their road is performed by a performance of the majority's subsequent agreement not to carry on that business from 1884 to 1983.

The immateriality of the mere incorporation of the partners, on the question of the power of the majority in this case, is settled in

[1] Smith *v.* Crooker, 5 Mass. 538, 540; Martendale *v.* Follet, 1 N. H. 95-97; P. Bridge *v.* Mathes, 8 N. H. 139, 141; Burnham *v.* Ayer, 35 N. H. 351, 354; Cole *v.* Hills, 44 N. H. 227, 232.

the case of a river-improvement company, decided by this court in 1817. Union Locks & Canal *v.* Towne,[1] was a suit brought to recover assessments made by the plaintiffs on a share of their capital for which the defendant had subscribed. The plaintiff's charter, passed in 1808, authorized them to render Merrimack River navigable from Amoskeag Falls southward to Reed's Ferry, a distance of about eight miles, and for effecting this object to buy six acres of land, and to collect, for forty years, a toll not averaging over twelve per cent on the capital invested.[2] In 1809 an additional Act, passed on the plaintiffs' petition, repealed the limitations of the amount and duration of toll, and authorized them to buy one hundred acres of land instead of six. In 1812 another Act granted to one Sullivan the right of locking Cromwell's Falls, which were about six miles south of Reed's Ferry, authorized him to transfer his rights in this grant to the plaintiffs, and provided that "whenever such transfer shall be made, . . . this Act shall be considered as an addition to the aforesaid Act incorporating the proprietors of Union Locks and Canal." The transfer was made and accepted in 1813. The defendant did not assent to either of the changes of the company's powers; and it was held that the enlargements accepted by the majority of his associates were material alterations of the original enterprise and of the contract made by the company with its members, and that he could not be compelled to pay for the share for which he had subscribed.

The grounds of that decision are fully reported. The terms of the defendant's contract are limited by the charter. To make a valid change in this private contract, as in any other, the assent of both parties is indispensable. The corporation on one part can assent by a vote of the majority; the defendant on the other part by his own personal act. The defendant, having never assented to either of the additional Acts, is under no obligations to the plaintiffs except what he incurred by becoming a member under the first Act. Assessments made to advance objects essentially different, or the same objects in methods essentially different, from those originally contemplated, are not made in conformity to the defendant's contract with the corporation; and the action, sustainable on that contract alone, cannot be supported. Assuming his membership, and regarding him as having made a purchase of a share under the Act of 1808, the obligations imposed on him by that purchase

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[1] 1 N. H. 44.

[2] See 9 Granite Monthly, 5, 6.

were to pay assessments made for the objects, and under the restrictions, contained in that Act, and not to pay assessments made for other and more extended objects, or under different and fewer restrictions. Notwithstanding the laudable object and great utility of the additional Acts, if they effected a material change, he is able to say *non hæc in fœdera veni*. The company's acceptance of the Act of 1812 for locking Cromwell's Falls effected a material change in the original corporation. It was, in fact, uniting two distinct corporations. After that acceptance the money assessed would be raised not only for the purpose first contemplated, of making the Merrimack navigable eight miles, from Amoskeag Falls down to Reed's Ferry, but also for the purpose of making it navigable at Cromwell's Falls, — a place six miles below Reed's Ferry, and wholly without the boundaries included in the first Act. Neither the letter nor the spirit of the defendant's contract could extend to an object which was not originally within the contemplation and power of the parties. The amendment of 1809 does not vary the bounds of the river-improvements, but it grants a material increase of corporate power. The additional Acts are a variation from the contract originally made, and a variation, too, which reaches the essence of the contract. The defendant's assent to amendments extending the objects, or increasing the powers of the corporation, is not to be presumed, but must be expressly shown.

On these grounds it was held that he was not engaged in the new enterprise of locking Cromwell's Falls, or the new enterprise of buying one hundred acres of land instead of six, and collecting a toll unlimited in amount and duration instead of one not exceeding twelve per cent for forty years. He was not bound by the votes of the majority enlarging the power he had given them over his share of the corporate property. The amendments of the charter were a waiver of the public objection to an enlarged area of corporate power; but as he was bound by nothing but his own contract as to the authority of the majority to act for him as his agents within the original area, so he could be bound by nothing but his own contract for an extension of that authority. The decision and the reasons on which it was based are affirmed in March *v.* Eastern R. Co.[1] The doctrine of agency, thus applied, has been maintained in this State seventy years, and there is no legal or equitable principle on which it can be overturned.

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[1] 43 N. H. 515, 525, 526, 532, 533.

If the defendant in Union Locks & Canal *v.* Towne had paid his share of the capital before the passage of the Act of 1809, his rights would have required some other remedy than a defence in that suit.[1] His agents could gain no legal advantage over him by postponing the enlargements till he paid his share. In the absence of other adequate remedy, his rights could be maintained by writ of *mandamus*, or other process from the common-law jurisdiction that superintends all civil corporations.[2]

If the works of the Union Locks & Canal had been constructed within the bounds of the charter, and the fact had then been found that the investment would be wholly lost unless they opened communication with the Middlesex Canal by locking Cromwell's Falls, or that the extension was necessary to accomplish the purposes of Towne's contract, the question might have arisen whether, on that point and to that extent, the case came within the implied power of doing what was necessary for carrying those purposes into effect.

Neither in that case nor in this was a legislative reservation of a power of altering and repealing the original legislative grant necessary to enable the Senate and House to make an additional grant of corporate power which the grantees could accept or refuse to accept. The meaning of such a reservation in a charter is an undisputed historic fact. Its only purpose and effect in the charter of the Northern Railroad is to enable the legislative grantors to revoke, wholly or partially, conditionally or unconditionally, their grant of legal rights to that company; that is, to alter the grant in some other way than giving them more rights which they can accept or reject. The reservation enables the Legislature to exercise the legislative power of revocation without the consent of the stockholders, and against their unanimous opposition. All legislative power except that of revocation can be exercised without the reservation. By New Hampshire law the charter being, on the part of the State, a repealable statute, and not a contract, the reservation is not necessary for any purpose.[3] By federal law, as construed by the federal court, it is necessary for the purpose of retaining the power of total and partial repeal. So

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[1] March *v.* Eastern R. Co., 43 N. H. 515; Cook, Stockholders, § 502.

[2] 3 Bl. Com. 42; 1 Bl. Com. 470, 471; High, Extr. Remedies, ch. 4; Boody *v.* Watson, 64 N. H. 162, 170, 171, 172, 173; B. C. & M. Railroad *v.* State, 32 N. H. 215, 230, 231.

[3] See 6 HARVARD LAW REVIEW, pp. 213–216. — EDITORS.

far as federal construction makes the charter a contract of the State, as well as a law, it would, if unqualified, introduce the evil of an irrepealable legislative Act. By the reservation, the Senate and House continued to hold that rescinding portion of their power which, in the opinion of the federal court, they would have lost if they had not expressly retained it. By the Act of incorporation, qualified by the reservation, they lost no power and gained none. With the reservation, for all the purposes of this case, they have the whole of the supreme legislative power vested in them by the second article of the Constitution; and they can exercise the whole of it as well without a vote of the stockholders, or against their unanimous objection, as with their unanimous assent. And if all contractual power were legislative, it would follow, not only that the Senate and House can make any agreement between those stockholders as to what business they will undertake, but also that the members of a legislative body, acting in their official capacity, are the only persons legally competent, in this State, to make that or any other contract.

The grant of leasing power to the Northern Company, like the grant of other powers in the charter, being ineffective until accepted by the grantees, is not an alteration of the partnership contract. As the grantees made every granted power a part of that contract when they accepted the charter and thereby made it the evidence of their agreement, so they alter the contract by inserting in it every other power which they afterwards accept. The grant of leasing power is an enabling Act. It legalizes their alteration of their contract, and their exercise of the new power when their acceptance of it has made it theirs. On the question whether it has been granted and accepted, it is immaterial whether, when accepted, it is to be exercised by two-thirds, or a majority, or one of the partners.

(*To be continued.*)